In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 373

HOXSEY CANCER CLINIC, A PARTNERSHIP, AND HARRY M. HOXSEY, AN INDIVIDUAL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Appeals, review of which is sought here, denying petitioners leave to intervene but permitting them to file a brief *amicus curiae* in a mandamus proceeding to compel compliance with the mandate of that court (R. 36–38), is not reported. A copy of the opinion of the Court of Appeals issued on October 22, 1953, after the filing of the petition for certiorari, holding that the mandate had not been complied with, is printed as an Appendix to this brief, *infra*, pp. 9–16. The prior opinion of the Court of Appeals is reported at 198 F. 2d 273, certiorari denied, 344 U. S. 928.

JURISDICTION

The order of the Court of Appeals was entered on September 8, 1953 (R. 38). The petition for a writ of certiorari was filed on September 24, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals erred in denying petitioners leave to intervene but permitting them to file a brief *amicus curiae* in a mandamus proceeding involving the lower court's compliance with the mandate of that court.

STATEMENT

Petitioners seek review of an order of the Court of Appeals denying them leave to intervene but permitting them to file a brief *amicus curiae* in a mandamus proceeding brought by the government to compel compliance with the mandate of that Court issued on reversal of a judgment against the United States in a proceeding under the Federal Food, Drug, and Cosmetic Act (see 198 F. 2d 273). The prior proceedings were before this Court on a petition for a writ of certiorari to review the judgment of the Court of Appeals (No. 491, O. T. 1952, certiorari denied, 344 U. S. 928, rehearing denied, 345 U. S. 914). As appears from that proceeding, the United States sued under the Federal Food, Drug, and Cosmetic Act to enjoin the defendants from introducing the Hoxsey medicines into interstate commerce, on

the ground that the drugs were falsely represented as effective cures for cancer. (No. 491, R. 3–6, 539). The evidence introduced to establish the misbranding of the drugs is summarized in detail in the government's brief in opposition to the petition for certiorari in No. 491, O. T. 1952, and in the prior opinion of the Court of Appeals reported at 198 F. 2d 273. The district court had denied the government's prayer for injunctive relief, finding that the medicines sometimes cure cancer, that the booklets promised nothing more, and that the government had failed to carry its burden of proof (No. 491, R. 1140–1147).

The Court of Appeals held that the findings of the district court were clearly erroneous. It found that petitioners' booklets promised persons suffering from cancer results at least comparable to surgery and X-ray, and that the uncontradicted evidence established the falsity of nine specific claims of cures. It also found that the testimony offered on behalf of petitioners—testimony of laymen about cancer cures and testimony of three osteopaths, two of whom did not claim to be experts in cancer, and the other of whom was an interested witness—did not serve to overcome the weight of the government evidence consisting of testimony of experts in pharmacology, in the diagnosis and treatment of cancer, and of persons conducting controlled animal experiments with petitioners' medicines. Noting that the respective formulae of petitioners' two liquid medicines

were "neither secret nor contested", the court said:

> We do not have for consideration the merits even of any claimed newly discovered, or secret, drug or cure. The case involves the efficacy of only well known drugs. As a cure for cancer these have been weighed and found wanting.

The court found that:

> * * * the overwhelming weight of the credible evidence requires a conclusion that the representation that the Hoxsey liquid medicines are efficacious in the cure of cancer is likewise false and misleading. The evidence as a whole does not support the finding of the trial court that "some it cures, and some it does not cure, and some it relieves somewhat."

Accordingly, the Court of Appeals entered an order directing that the judgment be reversed and the cause remanded to the District Court "with directions that the trial Court order an injunction to issue as prayed" (R. 20–21).

On February 7, 1953, the Court of Appeals issued its mandate (R. 20–21). After some delay (R. 5–6, paragraphs 5–8), the district judge set the matter for hearing and on June 29, 1953, entered a final judgment in the form proposed by the Hoxsey Cancer Clinic (R. 28–30).

The final decree (R. 29) prohibited labeling of the drugs which represents, suggests or implies that the drugs are beneficial, effective or have

value in the cure, mitigation, or treatment of any type of cancer in human beings, *"without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations."* [Emphasis supplied.]

The United States, believing that the mandate of the Court of Appeals had not been complied with, filed a petition for a writ of mandamus in the Court of Appeals to have stricken from the injunction the qualifying words italicized above (R. 1–8). Before an order to show cause could issue, the Honorable William H. Atwell, United States District Judge for the Northern District of Texas, filed an answer to the petition for mandamus (R. 35–36). The case was thus at issue when the petitioners, on September 2, 1953, filed a motion for leave to intervene or, in the alternative, for leave to file a brief *amicus curiae* (R. 36–38). Intervention was denied, but leave to file the brief was granted (R. 38). The petition for a writ of certiorari seeks review of the Court of Appeals' order denying the motion for leave to intervene.

On October 22, 1952, after the filing of the petition for a writ of certiorari, the Court of Appeals rendered its opinion in the mandamus proceeding, a copy of which is printed as an Appendix, *infra*, pp. 9–16. It found "that the decree of the court to the extent complained of in the petition is in direct conflict with our mandate, that the answer

of the district judge to the show cause order not only presents no reason why the mandate should not issue as prayed, but, on the contrary, shows that it should, and that the complained of paragraphs should be stricken and expunged from the decree." The opinion notes that the respondent judge conceded that the decree did not correspond to the judgment of the Court of Appeals but that "instead of confessing error in not accepting and giving effect in his decree to the judgment of reversal, defends the reinstatement of his own judgment to the extent accomplished by the addition to the decree. This he may not do."

In accordance with the practice of that court, the Court of Appeals certified its opinion to the district judge but withheld issuance of the writ of mandamus. On October 26 the district judge issued a decree of permanent injunction complying with the suggestion of the Court of Appeals and omitting the qualifying phrase italicized at page 5, *supra*.

ARGUMENT

The opinion of the Court of Appeals of October 22, noted above, makes clear, what was implicit in the cause before, that the mandamus proceeding concerned a matter of judicial administration in which petitioners were neither proper nor necessary parties. The Court of Appeals had, in the earlier proceeding, adjudicated petitioner's rights, and review had been sought and denied in respect of the court's judgment as to the proper

injunction to be issued against petitioner. Petitioners had thus had full determination of the issues involving their claims before the mandate issued.

This Court has held that it is "a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court." *United States* v. *United States District Court,* 334 U. S. 258, 264. That function of supervising lower federal courts is obviously not one in which petitioners can claim an interest as of right.

Recognizing that petitioners were interested in the outcome of the litigation, the Court of Appeals afforded petitioners an opportunity, of which they took advantage (See Appendix, *infra,* p. 13), to present to the court their views of the applicable law. As a practical matter, there is little difference in an appellate court between appearing as intervener or *amicus curiae.* But it is clear that in the particular proceeding here involved no unadjudicated rights of petitioners were at issue. It was therefore proper for the Court of Appeals not to permit them to come in as parties.

The precise question presented does not appear to have arisen in other cases, and is not likely often to recur. Petitioners have not been prejudiced by the action of the court below, which was proper in any event, since they were permitted to present

their arguments. And the judgment of the district court has already been modified to conform to the court of appeals' original mandate.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1953.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 14690

IN RE: UNITED STATES OF AMERICA, PRAYING FOR A WRIT OF MANDAMUS

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(October 22, 1953)

Before HUTCHESON, Chief Judge, and RUSSELL and RIVES, Circuit Judges

PER CURIAM: Alleging that, though directed by the mandate of this court [1] to "order an injunction to issue as prayed", the district judge had failed and refused to do so, the United States of America filed its petition,[2] praying that a writ of man-

[1] In accordance with its opinion, 198 F. (2) 273.

[2] As the petition briefly and correctly alleges them, these are the substantial facts on which the claim of the United States to relief is based:

"1. On November 15, 1950, the United States instituted an action in the United States District Court for the Northern District of Texas by filing a complaint wherein a statutory injunction, under the Federal Food, Drug and Cosmetics Act, was sought to restrain the Hoxsey Cancer Clinic, a

damus issue to Judge William H. Atwell, Judge of the United States District Court for the Northern District of Texas, "To vacate and expunge

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partnership, and Harry M. Hoxsey, an individual, from introducing into interstate commerce certain liquid medicines represented by labeling as effective in the treatment of internal cancer in man. Defendants answered. The case came on for trial before the Court and resulted in a judgment for the defendants. The trial court's opinion dismissing the cause is reported at 94 Fed. Supp. 464.

"2. The United States duly perfected its appeal to this Court, and the cause was there argued and submitted. On July 31, 1952, this court decided the cause, reversed the said judgment and remanded the case with direction that the trial court order an injunction as prayed. This court's opinion is published at 198 F. (2) 273.

"3. The said Hoxsey Cancer Clinic and Harry M. Hoxsey filed a petition for a writ of certiorari in the Supreme Court of the United States, and on Feb. 2, 1953, the Supreme Court denied the petition, 344 U. S. 928. A motion for rehearing on the said petition was denied on Mar. 9, 1953, 345 U. S. 914.

"4. On Feb. 7, 1953, this Court's mandate was issued, directed to the said United States District Court for the Northern District of Texas. A copy of the mandate is attached hereto as Exhibit 'A'.

"5. The United States thereupon prepared and submitted to the Honorable William H. Atwell, Judge of the United States District Court for the Northern District of Texas, a proposed decree and requested that it be entered in conformance with the said mandate.

"6. The Honorable William H. Atwell directed counsel for the United States to submit the proposed decree to opposing counsel for approval. After diligent efforts to obtain such approval failed, counsel for the United States advised Judge Atwell that James H. Martin, local counsel for the defendants, had disapproved the decree and that said counsel for the United States was unable to obtain approval from the principal counsel for the defendants, Herbert K. Hyde of Oklahoma City. Counsel for the United States thereupon

the final decree of June 29, 1953, so far as it fails to conform to the mandate of this Court, by striking from the said final decree the words reading as follows: 'without appropriate qualifying state-

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renewed his request that the proposed decree be entered. A copy of the proposed decree is attached as Exhibit 'B'.

"7. On June 12, 1953, Judge Atwell, by letter to counsel, advised William Cantrell, Jr., Assistant United States Attorney, that he had examined the Government's proposed decree and that he would sign it on June 29, 1953, when the case was set for final disposition. A copy of Judge Atwell's letter to counsel is attached as Exhibit 'C'.

"8. Upon receipt of a copy of Judge Atwell's letter, Lee Williams, one of the attorneys for the Hoxsey Cancer Clinic and Harry M. Hoxsey, requested and received a copy of the decree proposed by the government, and thereupon submitted an alternative proposal for a decree. This alternative proposal, a copy of which is attached as Exhibit 'D', was approved by the Court and signed as the final judgment on June 29, 1953. A transcript of the proceedings before the said Court incident to such signing is attached as Exhibit 'E'."

[The substantial difference in the two decrees consists of the addition of these words "without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations."]

Based upon these facts, the petition proceeds as follows:

"9. Petitioner believes that the final decree is not in accordance with the mandate of this Court insofar as it authorizes the continued interstate distribution of the Hoxsey cancer medicines on condition that claims of effectiveness as cancer cures be qualified by a statement that there is a conflict of medical opinion as to the truth of such claims. This court has ruled that claims that the Hoxsey medicines will cure cancer are false in fact, thus leaving no room for asserted differences of medical opinion.

"10. Petitioner is advised and believes that a Writ of Mandamus is appropriate to control the action of a district court when such lower court has misconstrued the mandate of the

ments revealing the conflict of medical opinion as to the truth of such representations.'"

A show cause order having issued as prayed in the petition, Judge Atwell filed his answer to the order as follows:

> "Comes now William H. Atwell, Judge of the United States District Court for the Northern District of Texas, in answer to the order made by this Honorable Court, which order is dated February 7th, 1953, and which order is predated before the complained of injunction was signed by me. Such order was not signed until June 29, 1953.
>
> "Such order in all respects, corresponds to the judgment of this Honorable Court, save and except the paragraph which is

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Appellate Court and has not complied with the said mandate."

"WHEREFORE petitioner prays that a writ of mandamus may be issued out of and under the seal of this court, directed to the Honorable William H. Atwell, Judge of the United States District Court for the Northern District of Texas, commanding and requiring him as follows:

"To vacate and expunge the final decree of June 29, 1953, so far as it fails to conform to the mandate of this Court, by striking from the said final decree the words reading as follows: 'without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations.'

"Petitioner further prays that an order may be issued, directed to the said William H. Atwell, Judge of the United States District Court for the Northern District of Texas, requiring him to show cause in this court, at a time to be designated, why he should not vacate and expunge the judgment entered on June 29, 1953, and enter judgment according to the terms of the said mandate of this court as aforesaid."

now objected to by the government, reading as follows:

'Without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations.'

"The opinion of this Honorable Court shows distinctly that it recognized that there were different opinions as to the curative value and power of the defendant's remedies.

"In addition to such statement by this Honorable Court in its opinion was the great volume of testimony from witnesses in person who appeared and testified that they had been cured of skin cancer by the defendant's treatment and remedies. Photographs of the afflicted persons, both men and women, were offered in evidence, and identified by the respective witnesses as photographs of themselves when they were so suffering. And as they testified in court, there were not such blemishes, or, skin disorders that could be seen."

"This statement is made with great respect and with the statement that the McAnnulty healing case, 187 United States, when reexamined, as shown 338 United States, does not do away with the power of the trial court to pass upon the weight and credibility of the testimony.

"In the oral opinion which I rendered at the conclusion of the trial of the case, I held the government had not satisfied the burden of proof resting upon it."

"With great respect, I am

Yours very earnestly,

(S) W. H. ATWELL,

United States District Judge."

Thereafter an application was made to this court by the Hoxsey Cancer Clinic and Harry M. Hoxsey for leave to intervene in the mandamus proceeding. In the alternative, if such leave was denied, its counsel sought leave to file a brief *amicus curiae*. Leave to intervene was denied, leave to file a brief *amicus curiae* was granted, and the brief was filed.

We are of the clear opinion, for the reasons hereafter briefly stated, that the decree of the court to the extent complained of in the petition is in direct conflict with our mandate, that the answer of the district judge to the show cause order not only presents no reason why the mandate should not issue as prayed, but, on the contrary, shows that it should, and that the complained of paragraphs should be stricken and expunged from the decree.

> "It is settled that if the lower court misconstrues a decree of an appellate court and does not give full effect to the mandate his action may be controlled by a writ of mandamus. Whatever was before the appellate court and disposed of by the decree is considered as finally settled and becomes the law of the case. The trial court must carry the decree into execution according to the mandate. In re Potts, Petitioner, 166 U. S. 263." In Re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, 64 F (2) 915.

The district judge, in his letter attached as Exhibit "C" to the petition, in which he stated that he would sign the decree presented by the United States for entry, recognized this to be the

law. In that letter he stated, "The order seems to be in accordance with the direction of the Circuit Court of Appeals and I will sign the order on June 29th, when the case is set down for final disposition."

Instead, however, of signing the order as presented, he added to it language which had the effect of emasculating, if not of completely nullifying, the mandate. This is made plain not only by a comparison of mandate and decree but by the respondent's answer. Conceding in it that the complained of addition to the decree, "without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations", does not correspond to the judgment of this court, he attempts to justify its use in his decree by challenging the correctness of the mandate. Stating, "The opinion of this Honorable Court shows distinctly that it recognized that there were different opinions as to the curative value and power of the defendant's remedies. * * * that the McAnnulty healing case, 187 United States, when re-examined, * * * does not do away with the power of the trial court to pass upon the weight and the credibility of the testimony. * * * In the oral opinion which I rendered at the conclusion of the trial of the case, I held the government had not satisfied the burden of proof resting upon it.", he asserts in effect that he has a right to correct our mandate to conform to these views.

Thus reasserting the correctness of his judgment, which this court had reversed, and the incorrectness of our judgment reversing it, the

respondent instead of confessing error in not accepting and giving effect in his decree to the judgment of reversal, defends the reinstatement of his own judgment to the extent accomplished by the addition to the decree. This he may not do.

In accordance, however, with the practice of this court, which proceeds on the assumption that the district judge will conform to this court's directions herein contained, without the necessity of issuing the writ prayed for, *In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, supra,* a copy of this opinion will be certified to the district judge for his guidance, and the writ will not at this time issue.

A True copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 373

HOXSEY CANCER CLINIC, A PARTNERSHIP, AND HARRY M. HOXSEY, AN INDIVIDUAL,

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROY ST. LEWIS,
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LEE WILLIAMS,
Of Counsel.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Basis of jurisdiction of this Court	3
Question presented	3
Reasons relied on for the allowance of the writ	3
Prayer for writ	4
Brief in support of petition	5
Opinions	5
Jurisdiction	6
Statement of the case	6
Specifications of error and summary of argument	8

Table of Cases Cited

Albori v. *Smith*, 65 P. (2d) 81, 18 Capp. App. (2d) 615	14
Borough of Fort Lee, N. J. v. *United States*, 104 F. (2d) 275	13
Burgin v. *Deuel*, 207 N.W. 272, 189 Wis. 648	14
California Cotton Credit Corp. v. *Superior Court of California*, 10 P. (2d) 176, 122 Cal. App. 404	14
Central R. Co. of N. J., In re, 136 F. (2d) 633	14
City of Houston v. *Allred*, 66 S.W. (2d) 655, 123 Tex. 35	15
D. A. Schulte, Inc. v. *Londrigan*, 133 A. 702, 4 N.J. Misc. 574	14
Greif v. *Dullea*, 153 P. (2d) 581, 66 Cal. App. (2d) 986	14
Gullatt v. *Slaton*, 8 S.E. (2d) 47, 189 Ga. 758	14
Harris v. *Barker*, 12 P. (2d) 577, 80 Utah 21	14
Hoxey v. *U.S.*, 94 F. Supp. 464, 198 F. (2d) 273, 344 U.S. 928, 97 L. ed. 330	1, 10
Lanford v. *Smith*, 99 S.W. (2d) 593, 128 Tex. 373	14, 15
Leland v. *Twin Falls Canal Co.*, 3 P. (2d) 1105, 51 Idaho 204	14
Linder v. *United States*, 268 U.S. 5, 69 L. ed. 819, 45 S. Ct. 446	9

Page

Morton's Estate v. Chapman, 75 S.W. (2d) 876, 124 Tex. 42 14
People ex rel. Foley v. *Begole*, 56 P. (2d) 931, 98 Colo. 354 14
People ex rel. Markee v. *Barrett*, 48 N.E. (2d) 928, 383 Ill. 207 14
Root Refining Co. v. *Universal Oil Products Co.*, 169 F. (2d) 514, 335 U.S. 912, 69 S. Ct. 481, 93 L. ed. 444 15
State ex rel. Boulevard Mort. Co. v. *Thompson*, 151 So. 704, 113 Fla. 419 15
State ex rel. Franklin County v. *Lee*, 188 So. 775, 137 Fla. 656 14
State ex rel. Woods v. *Register of St. Land Off.*, 179 So. 38, 189 La. 69 14
Thomas v. *District of Columbia*, 90 F. (2d) 424, 67 App. D.C. 179 15
Williams v. *Wray*, 72 S.W. (2d) 577, 123 Tex. 466 14
Windsor v. *McVeigh*, 93 U.S. 274, 23 L. ed. 914 15
Wise v. *Herzog*, 114 F. (2d) 486, 72 App. D.C. 335 16

STATUTES CITED

Constitution of the United States:

5th Amendment 3, 9
10th Amendment 6

Corpus Juris, Volume 55, p. 473, 477, Nos. 253 and 254c 12, 13

Federal Food, Drug and Cosmetic Act:

21 U.S. C. 301, et seq. 6
21 U.S.C. 331(a) 11
21 U.S.C. 352(a) 8

Federal Rules of Civil Procedure, Rule 24(a)(2) 15
House Report No. 2139 11
Texas Civil Statutes, Chapter 6, Article 4542n(8) 10

United States Code:

Title 28, Section 1254, 62 Stat. 928 ..... 3, 6
Title 28, Section 2101, 62 Stat. 961 3

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HOXSEY CANCER CLINIC, A PARTNERSHIP, AND HARRY M. HOXSEY, AN INDIVIDUAL,

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The Petition of Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey, an individual, respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

Petitioners pray this Court to review by certiorari an Order entered on September 8, 1953, by the Court of Appeals for the Fifth Circuit, denying petitioners leave to intervene in an original Mandamus action pending in said Court of Appeals, in which judgment has not yet been entered (R. 38).

The matter involved is the correctness of a Decree of Permanent Injunction (R. 28) entered on June 29, 1953, in the United States District Court for the Northern District of Texas, Dallas Division, by the Honorable William H. Atwell, Judge of said Court.

The history of the litigation involved is as follows:

The United States instituted an action in the District Court seeking a statutory injunction against petitioners, alleging misbranding of certain drugs, under the Federal Food, Drug and Cosmetic Act. Trial before Judge Atwell resulted in judgment for the defendants, petitioners herein. 94 F. Supp. 464.

The United States appealed to the Court of Appeals for the Fifth Circuit, which reversed the trial Court and directed an injunction to issue "as prayed." 198 F. 2d 273.

Certiorari was denied in this Court. Case No. 491, October Term, 1952 (344 U. S. 928, 97 L. Ed. 330).

Mandate was issued from the Court of Appeals for the Fifth Circuit to the District Court, directing that Court to "order an injunction to issue as prayed" (R. 20).

The United States, being dissatisfied with the terms of the injunction entered, on August 10, 1953, filed in the Court of Appeals for the Fifth Circuit, an "Application for leave to file Petition for Mandamus (R. 1). This is entitled, "In the Matter of the Petition of the United States for a Writ of Mandamus," and was docketed as No. 14690.

Attached to the Application is a Petition for a Writ of Mandamus (R. 3), which is entitled, "In re United States of America vs. Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey," and prays that Judge Atwell be commanded to vacate and expunge the final decree of injunction entered against petitioners by striking therefrom certain qualifying words (R. 7).

The record contains no notice or order to show cause, either to Judge Atwell or to these petitioners.

However, on the following day, August 11, 1953, Judge Atwell, apparently having been advised of the filing of said application and petition, filed his Answer thereto (R. 35).

Thereafter petitioners filed their "Application for Leave to Intervene" in said cause (R. 36), which was denied by the Court of Appeals on September 8, 1953 (R. 38).

B

Basis of Jurisdiction of This Court

Jurisdiction of this Court to review, by certiorari, the decision of the Court of Appeals denying petitioners leave to intervene in said cause, "before judgment has been rendered in the court of appeals," is given by U. S. C., Title 28, Section 1254(1), and this Petition is filed within the period provided by U. S. C., Title 28, Section 2101(e), 62 Stat. 961.

C

Question Presented

Whether Petitioners are necessary or proper parties, and as such entitled to intervene prior to a determination by the Court of Appeals of the petition for mandamus.

D

Reasons Relied on for the Allowance of the Writ

1. The decision of the Court of Appeals denies to the petitioners due process of law as guaranteed under the Fifth Amendment to the Constitution, in that it denies to them the right to notice and a hearing upon a subject matter in which petitioners have a vital interest.

2. The decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

Prayer for Writ

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 14690, In re United States of America, Praying for a Writ of Mandamus;" and that said judgment of the said Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

HOXSEY CANCER CLINIC, a Partnership, and
HARRY M. HOXSEY, an Individual,
Petitioners,

By ROY ST. LEWIS,
H. K. HYDE,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 373

HOXSEY CANCER CLINIC, A PARTNERSHIP, AND HARRY M. HOXSEY, AN INDIVIDUAL,

Petitioners,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions

Memorandum Order of the Court of Appeals in this case appears at page 38 of the Record. There was no written opinion.

Opinions in the companion injunction suit are reported as follows:

Opinion by William H. Atwell, United States District Judge, in the United States District Court for the Northern District of Texas, 94 F. Supp. 464.

Opinion of the Court of Appeals for the Fifth Circuit (Hutcheson, Chief Judge, and Russell and Rives, Circuit Judges; written by Circuit Judge Russell), 198 F. 2d 273.

Certiorari denied by this Court, no opinion, Case No. 491, October Term, 1952 (344 U. S. 928, 97 L. Ed. 330).

II

Jurisdiction

Jurisdiction of this Court to grant certiorari is invoked under Title 28, Section 1254(1), U. S. C., 62 Stat. 928, and is shown in the Petition at Page 2.

III

Statement of the Case

The United States seeks a writ of mandamus directed to the Honorable William H. Atwell, Judge of the United States District Court for the Northern District of Texas, commanding him to vacate and expunge a final decree of injunction *entered against petitioners,* by striking therefrom certain qualifying words (R. 7).

The questioned Decree of Injunction was entered in Case No. 4144 in said District Court (R. 28) in pursuance of a Mandate from the Court of Appeals for the Fifth Circuit (R. 20), which mandate directed the trial court to "order an injunction to issue as prayed" (R. 21).

For a complete understanding of the issues in the injunction suit, reference is made to the Record in said case as presented to this Court on petition for certiorari in Case No. 491, October Term, 1952, 344 US 928, 97 L. ed. (Adv. Op) 330, and when reference is made to said record it will be so designated, "(#491, R. —)."

The United States filed said Case No. 4144 seeking a statutory injunction under the Federal Food, Drug and Cosmetic Act (21 USC 301 et seq.), to prevent petitioners herein from introducing into interstate commerce certain medicines intended for use in the treatment and cure of

cancer. The Complaint in said action (#491, R. 3) alleged specifically that the drugs were "misbranded", because their labeling, specifically a booklet accompanying them, contained "general and specific statements which represent and suggest that said drugs are efficacious in the treatment, mitigation and cure of cancer in man, which statements are false and misleading since said drugs are not efficacious in the treatment, mitigation and cure of cancer in man." The Complaint further alleged that unless restrained petitioners herein would continue to introduce into interstate commerce "the said drugs misbranded in the manner aforesaid" (#491, R. 6), and the prayer of said Complaint was that an injunction issue against the introduction into interstate commerce of, (#491, R. 6),

> "the said drugs or any similar article of drug *which is misbranded.*"

After an extended trial judgment was entered by the trial court for the defendants, petitioners herein (#491, R. 1149), which judgment was reversed by the Court of Appeals for the Fifth Circuit (#491, R. 1157) 198 F. 2d 273, and after this Court denied certiorari in said Case No. 491, October Term 1952, 344 US 928, said cause was "remanded to the said District Court with direction that the trial Court order an injunction to issue as prayed." (R. 20-21.)

A proposed form of decree of injunction was prepared and presented to Judge Atwell by the Government (R. 23), but was not signed by him because, as he stated (R. 32) he thought it was "a little too broad." Instead he signed and entered the form of order prepared and presented by counsel for the defendants, petitioners herein (R. 28, 33). This Order is *exactly* the same as the proposed order presented by the Government, *with only one exception:* it enjoins petitioners perpetually from introducing the drugs involved into interstate commerce in violation of 21 USC 331(a) so

long as they are misbranded within the meaning of 21 USC 352(a); the use of the booklets constituting the alleged misbranding "are specifically prohibited;" and the labeling of said drugs "which represents, suggests or implies that the drugs are beneficial, effective or have value in the cure, mitigation, or treatment of any type of cancer in human beings,

> without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations,

is prohibited" (R. 28-29). The phrase indented is that which the Government seeks to have stricken from the decree (R. 7).

Stated otherwise, the Government would have the Court enjoin petitioners from introducing said drugs into interstate commerce absolutely, *whether they are misbranded or not*—for they could not be misbranded if representations as to their efficacy are qualified by revealing that such representations have only a narrow and limited support.

IV

Specifications of Error, and Summary of Argument

While mandamus may be an appropriate remedy to require a lower court to carry out the mandate of an appellate court and to enter judgment in accordance therewith, where the action required is purely ministerial and not discretionary, and the right to such relief is plain; and while the writ, if issued, would be directed against the Judge of the lower court, and not against petitioners; yet where the granting of the writ would prejudicially affect the interests of petitioners, and petitioners have a direct and vital interest in the subject matter of the mandamus proceeding, they are necessary and proper parties to such proceeding, and, where not made parties, it is prejudicial error

to refuse to permit them to intervene and have a hearing upon their objections to the issuance of the writ, and constitutes a violation of due process of law as guaranteed by the Fifth Amendment to the Constitution and a departure from the accepted and usual course of judicial proceedings.

V

Argument

The decree of injunction involved runs, as well as against petitioners, against "their agents, servants, employees, representatives, attorneys and assigns and all persons in active concert or participation with them." (R. 28). The trial of the injunction suit developed the fact that every person receiving the medicine involved was first "personally examined" (#491, R. 910) by a doctor duly licensed as such by the State of Texas and a graduate of a medical school (#491, R. 903); that no medicine was sold, and the only medicines going into interstate commerce were those given or sent to those patients, under prescriptions by such doctor (#491, R. 910).

The Tenth Amendment to the Constitution of the United States provides that,

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Constitution does not delegate to the United States the power to regulate the practice of medicine, nor does the Constitution prohibit the States from regulating such practice. That power, therefore, is reserved to the States, or to the people. It was so held by this Court in *Linder* v. *United States*, 268 U. S. 5, 69 L. Ed. 819, 45 S. Ct. 446:

> "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government."

Accordingly the State of Texas has enacted Chapter 6 of Texas Civil Statutes, regulating the practice of medicine in that State, Article 4542n(8) of which prohibits sales, etc., of drugs other than in original packages by others than registered pharmacists,

> "Provided, however, that nothing in this Act shall apply to or interfere with any licensed practitioner of medicine—who is duly licensed as such—who shall supply his or her patients, as a physician—and by them employed as such, with such remedies as he or she may desire—."

If the writ of mandamus were to issue in this case as prayed by the Government, and the qualifying phrase quoted stricken from the injunction, then the Court would say to the duly licensed physicians employed at the Hoxsey Cancer Clinic, "You cannot prescribe this medicine for any patient and deliver it to him knowing that he intends to take it home with him to another State and use it in accordance with your prescription." And it would say to the patient who travelled from another State to Texas, "You cannot choose and employ any physician at the Hoxsey Cancer Clinic and have him prescribe this medicine for you and take it home and use it."

It was evidently because of this restriction of the Tenth Amendment that the Court of Appeals said in its opinion in the injunction suit, 198 F. 2d 273 (#491, R. 1172-3):

> "We do not attempt to set ourselves up as arbiters of what method of treatment the Hoxsey Clinic shall employ. *We are not authorized by law to do so.*"

It is apparent, therefore, that the Hoxsey Clinic *and the duly licensed physicians there employed,* have a *vital interest* in whether the writ of mandamus prayed for be issued.

That the granting of the writ would greatly and prejudicially affect the interests of petitioners is very apparent from the very reading of the entire subdivision II of the

Government's brief in support of its petition for mandamus (R. 10). The heading to this argument claims that,

> "The Trial Court's Final Judgment Violates the Mandate by Authorizing Hoxsey to Sell His Drugs as Cancer Cures on Condition that His Labelings State that there is a Difference of Medical Opinion as to the Truth of the Representation."

We do not here intend to attempt to argue the merits of *what* the terms of the injunction should be, although that is what is argued by the Government under the above heading. If we incidentally mention some of the merits, it is merely for the purpose of showing the vital interest of petitioners.

The Federal Food, Drug, and Cosmetic Act under which the injunction suit was prosecuted, in 21 USC 331(a), prohibits,

> "The introduction—into interstate commerce of any—drug—*that is—misbranded.*"

It does not prohibit interstate commerce in *all* drugs, nor does it prohibit such commerce in *any particular drug,* but *only* in such drugs "that is misbranded."

The purpose of the Act is shown in Report No. 2139 of the House of Representatives (as reported in Toulmin, p. 400):

> "—There are clear implications in cases arising under the old Food and Drug Act and other laws that *Congress may not,* by a simple and *unqualified* prohibition against misleading representations, penalize the making of a representation of therapeutic effect regarding the truth of which expert opinion differs.—
>
> "*The reason for this limitation on the power of Congress is apparent.*—
>
> "One of the important applications of section 201 (n) (21 USC 321(n)) relates to this problem. If only a few experts regard a label statement of curative value as true but the great body of qualified experts in

> that particular field regard the statement as untrue, then there may be substantial ground for concluding that the curative claim is misleading *unless* it is *qualified* in such a way as to show the conflicting opinion as to its truth.—However, the misleading character of the label may be *corrected by an appropriate qualifying statement* revealing this material fact."

This Congressional Report made when the Act was passed was known to and considered by Judge Atwell when he included in the injunction decree entered by him the *qualifying* phrase now objected to by the Government. Congress recognized that it had no power to prohibit a duly licensed physician from prescribing whatever medicine he desires for a patent, knowing that patient will take that medicine into interstate commerce, *so long as* that physician *qualified* his claim of curative value by telling the patient that he, and he alone, believed such claim, but that the great body of qualified experts in that field regarded the claim as untrue. And since the Congress has no such power, the Court has no more.

In his consideration of these matters and the determination of what the exact terms of the injunction should be, certainly Judge Atwell was acting in more than the carrying out of a "ministerial duty." It was more in the nature of an exercise of a discretionary power to carry out the mandate of the Court of Appeals by issuing the injunction "as prayed for." If he committed an error of law in so doing, which we do not admit, it would be a matter for appeal, not for mandamus.

The general rule concerning making persons interested in the subject matter of a mandamus proceeding parties is stated in 55 CJS 473, #253:

> "As a general rule all persons or parties having an interest in the subject matter of a mandamus proceeding may properly be joined as parties respondent or defendant, and *they are usually required to be so joined.*"

and, again, as to the right of such persons to intervene, at 55 CJS 477, #254c:

> "As a general rule any person or corporation having an interest in the subject matter or whose right or interest will be affected by the judgment awarding the writ may intervene in mandamus proceedings."

Few *Federal* cases are reported in which this right of interested persons to be made parties has been considered. One such case is *Borough of Fort Lee, N. J.* v. *United States* (CA 3), 104 F. 2d 275, in which relators had recovered a judgment on overdue bonds against the Borough. Execution thereon was returned *nullo bona.* Mandamus was thereupon sought to compel the officials of the Borough to levy, collect and pay over a tax sufficient to satisfy the judgment. The Municipal Finance Corporation, a State agency created by New Jersey law for the supervision of financially embarrassed municipalities, made application for leave to intervene, alleging they were functioning in the Borough:

> "The Court below refused the Commission this right, we think erroneously. The Commission was functioning in the Borough and supervising its financial assets. Before any funds of the Borough could be paid out the checks or vouchers must be countersigned by the Commission's auditor. Under these circumstances the ability of the respondents to comply with the writ may depend upon the cooperation of the Municipal Finance Commission. Its members, therefore, should have been permitted to intervene as parties respondent in order that the writ granted the relators may be made fully effective."

The books are replete, however, with cases, many of which are cited in CJS under the above headings, showing that persons having a vital interest in the subject matter of a mandamus proceeding, and whose rights will be prejudi-

cially affected by the granting of the writ, are not only proper but necessary parties thereto:

Greif v. *Dullea*, 153 P. 2d 581, 66 Cal. App. 2d 986;
Albori v. *Smith*, 65 P. 2d 81, 18 Cal. App. 2d 615;
People ex rel. Foley v. *Begole*, 56 P. 2d 931, 98 Colo. 354;
State ex rel. Franklin County v. *Lee*, 188 So. 775, 137 Fla. 656;
Gullatt v. *Slaton*, 8 SE 2d 47, 189 Ga. 758;
Leland v. *Twin Falls Canal Co.*, 3 P. 2d 1105, 51 Idaho 204;
People ex rel. Markee v. *Barrett*, 48 NE 2d 928, 383 Ill. 207;
State ex rel. Woods v. *Register of St. Land Off.*, 179 So. 38, 189 La. 69;
D. A. Schulte, Inc., v. *Londrigan*, 133 A 702, 4 NJ Misc. 574;
Landford v. *Smith*, 99 SW 2d 593, 128 Tex. 373;
Williams v. *Wray*, 72 SW 2d 577, 123 Tex. 466;
Harris v. *Barker*, 12 P. 2d 577, 80 Utah 21;
Burgin v. *Deuel*, 207 NW 272, 189 Wis. 648;
and many other cases.

"It is *elementary* that all parties interested adversely to relator *must* be made parties to mandamus proceedings."
Morton's Estate v. *Chapman*, 75 SW 2d 876, 124 Tex. 42;
City of Houston v. *Allred*, 66 SW 2d 655, 123 Tex. 35.

"Where mandamus is sought with respect to a cause before a court, the parties to such cause are necessary parties in the mandamus proceeding where their interests may be adversely affected."
California Cotton Credit Corp. v. *Superior Court of Calif.*, 10 P. 2d 176, 122 Cal. App. 404;

State ex rel. Boulevard Mortg. Co. v. *Thompson,* 151 So. 704; 113 Fla. 419;
Lanford v. *Smith,* 99 SW 2d 593, 128 Tex. 373;
and other cases.

While the Federal Rules of Civil Procedure for the United States District Courts are not applicable to the Courts of Appeal, it is to be noted that Rule 24(a)(2) provides that anyone shall be permitted to intervene in an action "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

And it was held in *Root Refining Co.* v. *Universal Oil Products Co.* (CA Del. & Pa.), 169 F. 2d 514 (cert. den. 69 S. Ct. 481, 335 US 912, 93 L. Ed. 444) that,

> "In proceeding in Circuit Court of Appeals to vacate judgment of such court on ground of fraud, the right to intervene was *governed by principles underlying this rule* regulating intervention in the district courts."

The "due process of law" clause of the Fifth Amendment gives to every person a right to a determination of their rights in an adequate and orderly proceeding conducted under authority of law and with observance of customary legal requirements as to *notice and hearing.*

Mr. Justice Field, in *Windsor* v. *McVeigh,* 93 US 274, 23 L. Ed. 914, said:

> "— Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter."

In *re Central R. Co. of N.J.* (CA NJ) 136 F. 2d 633:

> "The right to notice and hearing is one of ancient origin and by the "due process" clauses of the 5th and 14th Amendments has been safeguarded to all against deprivation by the Federal Government and the States, respectively."

To make an order which would affect the rights of the Hoxsey Cancer Clinic and its duly licensed physicians, without them being represented and heard in the proceeding, would be a gross invasion of this right to notice and a hearing.

Wise v. *Herzog,* 114 F. 2d 486, 72 App. D.C. 335:

> "The guaranty of 'due process' requires, for the exercise of judicial power, appropriate notice of the judicial action and an opportunity to be heard."

Thomas v. *District of Columbia,* 90 F. 2d 424, 67 App. D.C. 179:

> "This clause means, in its application to judicial hearings, a law which *hears before it condemns.*"

It is respectfully submitted that the refusal of the Court of Appeals to permit petitioners, whose substantial rights will be prejudically affected if the writ prayed for be allowed, and who are refused an opportunity to be heard, deprives them of due process of law, and constitutes a departure from the accepted and usual course of judicial proceedings, and that the writ of certiorari should be granted to the end that such error of the Court of Appeals for the Fifth Circuit may be corrected.

Respectfully submitted,

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